RECORD AND BRIEFS

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No. 16-980

In the Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE, PETITIONER

v.

A. PHILIP RANDOLPH INSTITUTE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The National Voter Registration Act of 1993 (NVRA), 52 U.S.C. 20501 *et seq.*, requires States to maintain accurate voter rolls by making a reasonable effort to remove the names of individuals who are no longer eligible to vote because they have moved or died. 52 U.S.C. 20507(a)(4). The NVRA provides that States' list-maintenance activities "shall not result in the removal of the name of any person * * * by reason of the person's failure to vote." 52 U.S.C. 20507(b)(2). Congress later amended Section 20507(b)(2) to clarify that it does not prohibit a State from removing individuals from the rolls if they fail to respond to an address-verification notice described in Section 20507(d)(2) and then fail to vote during a period spanning two federal elections. The question presented is:

Whether the NVRA prohibits a State from sending Section 20507(d)(2) address-verification notices to registrants who have not voted or otherwise contacted election officials for two years.

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INTEREST OF THE UNITED STATES

This case concerns the National Voter Registration Act of 1993 (NVRA), Pub. L. No. 103-31, 107 Stat. 77 (52 U.S.C. 20501 *et seq.*), and the Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666 (52 U.S.C. 20901 *et seq.*).[1] The Attorney General has authority to enforce the NVRA and HAVA by bringing civil actions seeking declaratory and injunctive relief. 52 U.S.C. 20510(a), 21111. The United States therefore has a substantial interest in the proper interpretation of the relevant statutory provisions.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-20a.

[1] All references to Title 52 of the United States Code refer to the 2015 Supplement.

STATEMENT

A. The National Voter Registration Act of 1993

1. The federal government and the States have shared constitutional authority to regulate federal elections. The Elections Clause states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." U.S. Const. Art. I, § 4, Cl. 1. The Clause thus "invests the States with responsibility for the mechanics of congressional elections," including voter registration, "so far as Congress declines to pre-empt state legislative choices." *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013) (citation omitted).

Every State except North Dakota requires citizens to register before voting in federal elections. U.S. Election Assistance Comm'n, *The Election Administration and Voting Survey: 2016 Comprehensive Report* 6 (2017). Registration establishes an individual's identity, eligibility to vote, and residence. *Id.* at 39. In most States, an individual wishing to vote must register before election day. *Id.* at 6. When voters appear at the polls, their names are "checked against the voter registration rolls to ensure that they are registered to vote and did not already vote." *Id.* at 7.

For most of our Nation's history, Congress left the regulation of voter registration to the States, which adopted a patchwork of laws. S. Rep. No. 6, 103d Cong., 1st Sess. 42, 46 (1993) (Senate Report). In 1993, however, Congress enacted the NVRA and established national registration requirements for federal elections.

2. The NVRA was enacted after a legislative process lasting more than five years. H.R. Rep. No. 9, 103d Cong.,

1st. Sess. 4-5 (1993) (House Report). As the NVRA's sponsor explained, the result was a carefully negotiated "compromise bill." *Voter Registration: Hearing Before the Subcomm. on Elections of the Comm. on H. Admin.*, 103d Cong., 1st Sess. 2 (1993) (Rep. Swift). That compromise balanced two competing goals.

On the one hand, Congress sought to "increase the number of eligible citizens who register to vote" and to "enhance[] the participation of eligible citizens as voters." 52 U.S.C. 20501(b)(1) and (2). To make it easier to register, Congress required States to allow citizens to register by mail, at designated state agencies, and when applying for a driver's license. 52 U.S.C. 20503-20506. And to avoid requiring voters to re-register unnecessarily, Congress limited the circumstances under which States may remove names from their voter rolls. 52 U.S.C. 20507; see Senate Report 2.

On the other hand, Congress also sought to "protect the integrity of the electoral process" and to ensure that States maintain "accurate and current" voter rolls. 52 U.S.C. 20501(b)(3) and (4). Congress recognized that, among other things, accurate registration lists are essential to "prevent[ing] voter fraud." Senate Report 18. It thus concluded that the goal of "open[ing] the registration process * * * must be balanced with the need to maintain the integrity of the election process by updating the voter rolls on a continual basis." *Ibid.*

3. To ensure the accuracy of the voter rolls, the NVRA requires each covered State to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the lists of eligible voters by reason of—(A) the death of the registrant; or (B) a change in the residence of the registrant." 52 U.S.C.

20507(a)(4).[2] Congress left the States substantial latitude to design their own list-maintenance programs, subject to federal requirements. Three of those requirements are particularly relevant here.

First, Section 20507(d) establishes a mandatory procedure for change-of-residence removals. It provides that a State "shall not remove the name of a registrant * * * on the ground that the registrant has changed residence" unless the registrant either (A) confirms the change in writing or (B) "has failed to respond to a notice described in" Section 20507(d)(2) and "has not voted or appeared to vote" during a period spanning the next two general federal elections. 52 U.S.C. 20507(d)(1).

A notice described in Section 20507(d)(2) is an address-verification notice sent by forwardable mail that includes "a postage prepaid and pre-addressed return card." 52 U.S.C. 20507(d)(2). The notice must inform registrants that if they have not moved (or have moved within the registrar's jurisdiction), they should return the card to maintain their registration. *Ibid.* The notice must further state that if a registrant does not return the card or vote during the relevant period, "the registrant's name will be removed from the list of eligible voters." 52 U.S.C. 20507(d)(2)(A). Section 20507(d) does not prescribe or restrict the grounds on which States may send address-verification notices.

Second, Section 20507(c)(1) describes an optional program that States may use to satisfy their obligation

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[2] Six States are exempt from the NVRA because they do not require registration to vote in federal elections or allow registration at the polls on election day. 52 U.S.C. 20503(b); see U.S. Dep't of Justice, *The NVRA: Questions and Answers*, https://www.justice.gov/crt/national-voter-registration-act-1993-nvra (last updated Aug. 7, 2017) (*DOJ Guidance*) (Question 2).

to make a reasonable effort to remove ineligible voters from the rolls. Under that safe-harbor program, a State obtains the names of individuals who have notified the United States Postal Service of a change in their address and then follows the Section 20507(d) notice procedure for individuals who appear to have moved outside the jurisdiction in which they are registered. 52 U.S.C. 20507(c)(1).

Third, Section 20507(b)(2) as originally enacted specified that States' list-maintenance programs "shall not result in the removal of the name of any person * * * by reason of the person's failure to vote." NVRA § 8(b)(2), 107 Stat. 83. In adopting that requirement, Congress sought to eliminate the pre-NVRA practice by which some States had removed registrants from the rolls "merely because they ha[d] failed to cast a ballot in a recent election." Senate Report 17. Congress concluded that individuals who fail to vote "may not have moved or died" and that eligible individuals should not be removed from the rolls "merely for exercising their right not to vote." *Ibid.*

B. The Help America Vote Act of 2002

1. After the NVRA took effect, States adopted a variety of approaches to comply with their Section 20507(a)(4) duty to make a reasonable effort to maintain accurate voter rolls. See Fed. Election Comm'n, *Implementing the NVRA: A Report to State and Local Election Officials on Problems and Solutions Discovered 1995-1996*, at 5-1 to 5-42 (Mar. 1998) (*1998 FEC Report*) (D. Ct. Doc. 38-16 (May 24, 2016)). As particularly relevant here, some States "use[d] failure to vote * * * over a certain period of time as a trigger for sending the forwardable confirmation notices" described in Section 20507(d)(2). *Id.* at 5-36. The Department of Justice

took the position that this practice of sending address-verification notices based on nonvoting violated Section 20507(b)(2)'s prohibition on removals for failure to vote. *Id.* at 5-22. But several States continued to send notices based on nonvoting, and the Federal Election Commission (FEC) reported in 1998 that the legality of that practice "ha[d] not yet been resolved." *Id.* at 5-36.

2. In 2002, Congress enacted HAVA, which included two provisions that are relevant here.

First, Congress amended Section 20507(b)(2). The amendment retained Section 20507(b)(2)'s original language prohibiting removals for failure to vote, but added a clause clarifying that prohibition's relationship to Section 20507(d). As amended, Section 20507(b)(2) provides that a State's list-maintenance program

> shall not result in the removal of the name of any person * * * by reason of the person's failure to vote, *except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual—*
>
> > *(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then*
> >
> > *(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.*

52 U.S.C. 20507(b)(2) (new text emphasized); see HAVA § 903, 116 Stat. 1728.

Second, HAVA directed States to develop "statewide voter registration list[s]." 52 U.S.C. 21083(a)(1)(A). As in the NVRA, Congress required States to adopt "[a]

system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote." 52 U.S.C. 21083(a)(4)(A). Specifically, Congress provided that, "consistent with the [NVRA], registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote." *Ibid.*

C. The Present Controversy

1. Since 1994, Ohio has used two procedures to remove registrants from the rolls on the ground that they have changed residences. Pet. App. 43a. The first is the safe-harbor process described in Section 20507(c), which the parties have called the "NCOA process" because it relies on the United States Postal Service's National Change of Address database. *Id.* at 4a, 44a-45a.

This case concerns Ohio's other procedure, which the parties have called the "Supplemental Process." Pet. App. 5a. Under the Supplemental Process, Ohio sends Section 20507(d)(2) address-verification notices to registrants who have not voted or engaged in other "voter activity" for two years. *Id.* at 5a, 46a. Consistent with Section 20507(d), registrants are removed from the rolls if they fail to respond to the notice and then fail to vote for an additional four-year period including two general federal elections. *Id.* at 5a, 47a.

2. Respondents are two nonprofit organizations and an Ohio voter. Pet. App. 2a-3a. In April 2016, they filed this suit against petitioner, the Ohio Secretary of State. *Id.* at 3a, 7a. Respondents principally argued that the Supplemental Process violates Section 20507(b)(2) by removing registrants by reason of their

failure to vote. *Id.* at 49a-50a. The district court rejected respondents' challenge to the Supplemental Process and entered judgment for petitioner. *Id.* at 39a-70a.

The district court first concluded that the Supplemental Process is covered by the clarifying clause added in HAVA, which specifies that Section 20507(b)(2) may not be construed to prevent a State from removing registrants "using the procedures described in [Section 20507](c) and (d)." 52 U.S.C. 20507(b)(2); see Pet. App. 55a. The court reasoned that "the unambiguous text" of that clause "specifically permits the Ohio Supplemental Process" because the Supplemental Process removes registrants using the procedure described in Section 20507(d). Pet. App. 59a; see *id.* at 55a-56a.

The district court also concluded that, even apart from the clarifying clause, the Supplemental Process "is consistent with both the NVRA and HAVA" because "voters are never removed from the voter registration rolls *solely* for failure to vote." Pet. App. 57a. The court explained that a failure to vote for two years *initiates* the Section 20507(d) process, but that registrants are not *removed* unless they fail to respond to a notice and fail to vote for the additional period specified in Section 20507(d).

3. A divided panel of the court of appeals reversed. Pet. App. 1a-37a.

a. The court of appeals first held that the Supplemental Process is not covered by HAVA's clarifying clause. Pet. App. 14a-20a. The court stated that the clause exempts from Section 20507(b)(2)'s prohibition only the specific use of nonvoting mandated by Section 20507(d)—the removal of registrants who fail to vote *after* receiving a Section 20507(d)(2) notice. *Id.* at 15a. The court therefore concluded that the clause does not

shield the Supplemental Process's use of nonvoting as the "trigger" for sending Section 20507(d)(2) notices in the first place. *Id.* at 15a-17a.

The court of appeals next held that the Supplemental Process violates Section 20507(b)(2)'s prohibition on removals "by reason of" registrants' failure to vote. Pet. App. 20a-24a. The court again emphasized that the Supplemental Process uses nonvoting as the "trigger" for sending Section 20507(d)(2) notices. *Id.* at 21a. The court stated that, "[u]nder the ordinary meaning of 'result,' the Supplemental Process would violate [Section 20507(b)(2)] because removal of a voter 'proceeds or arises as a consequence of his or her [initial] failure to vote.'" *Ibid.* (brackets and citation omitted). The court acknowledged that "subsection (b)(2)'s prohibition clause appears to have been given a more narrow interpretation by the HAVA," *ibid.*, which specifies that a registrant's name may not be removed "*solely* by reason of a failure to vote," 52 U.S.C. 21083(a)(4)(A) (emphasis added). But the court nonetheless concluded that the Supplemental Process violates Section 20507(b)(2) because the "trigger" for sending notices is "based 'solely' on a person's failure to vote." Pet. App. 22a.

b. Judge Siler dissented in relevant part. Pet. App. 32a-37a. He explained that, under the NVRA and HAVA, a State cannot remove registrants "for a failure to vote only." *Id.* at 34a. He concluded that the Supplemental Process does not violate that prohibition because it removes registrants only if they both fail to vote and fail to respond to a notice. *Ibid.*

SUMMARY OF ARGUMENT

Ohio and several other States have long used a registrant's failure to vote for a specified period of years as grounds for sending an address-verification notice under 52 U.S.C. 20507(d)(2). That practice does not violate the NVRA.

A. It is undisputed that Section 20507(d) itself does not restrict the grounds on which States may send address-verification notices. Instead, the court of appeals held that sending notices based on nonvoting violates Section 20507(b)(2)'s prohibition on removing a registrant "by reason of the person's failure to vote." That is not the best reading of Section 20507(b)(2) as originally enacted, and it is foreclosed by the clarifying clause that Congress added in HAVA.

1. Section 20507(b)(2)'s original prohibition on removing a registrant "by reason of the person's failure to vote" is best interpreted to prohibit removing a registrant *solely* for nonvoting. That is because a different provision, Section 20507(d), *requires* States to use nonvoting as the final precondition for removal, and Section 20507(b)(2) cannot be read to forbid what Section 20507(d) compels. Congress later confirmed that understanding in a related provision, which describes Section 20507(b)(2) as providing that "no registrant may be removed *solely* by reason of a failure to vote." 52 U.S.C. 21083(a)(4)(A) (emphasis added).

The Supplemental Process thus does not violate Section 20507(b)(2) because it does not remove registrants solely for their initial failure to vote. Registrants are sent a notice because of that initial failure, but they are not removed unless they fail to respond and fail to vote for the additional period prescribed in Section 20507(d).

2. HAVA's clarifying amendment confirms that Section 20507(b)(2) does not prohibit States from sending Section 20507(d)(2) notices based on nonvoting. The amendment was enacted against the backdrop of a dispute about the legality of that practice, and Congress resolved the dispute by clarifying that "nothing in [Section 20507(b)(2)] may be construed to prohibit a State from using the procedures described in [Section 20507](c) and (d) to remove an individual from the official list of eligible voters." 52 U.S.C. 20507(b)(2). Accordingly, although removals accomplished using the Section 20507(d) procedure may in some circumstances violate other NVRA provisions, HAVA's amendment makes clear that they do not violate Section 20507(b)(2). That is particularly clear because a contrary interpretation would deprive the amendment of practical effect.

3. The court of appeals erred in assuming that Section 20507(b)(2) would be superfluous unless it prohibited some removals that follow the Section 20507(d) procedure. Section 20507(d)'s procedure applies only when a State removes a registrant's name from the rolls "on the ground that the registrant has changed residence." 52 U.S.C. 20507(d)(1). Section 20507(b)(2)'s prohibition on removals for nonvoting applies more broadly, covering all of a State's list-maintenance activities. It thus makes clear that a State may not treat nonvoting itself as a sufficient basis for removal, and it also prevents a State from presuming that a registrant who has failed to vote has become ineligible on some ground other than a change of residence.

B. In addition to relying on Section 20507(b)(2), respondents have argued that the Supplemental Process violates an asserted requirement that a State may send

a Section 20507(d)(2) notice only if it receives some "reliable information" affirmatively indicating that a registrant has moved. The court of appeals did not rely on that argument, which improperly seeks to impose a requirement that Congress did not adopt. Neither Section 20507(d) nor any other provision of the NVRA imposes a "reliable information" standard or requires States to satisfy specific requirements before sending Section 20507(d)(2) notices. Early versions of the bill that became the NVRA included such prerequisites, but Congress rejected those proposals in favor of the more flexible approach reflected in the NVRA.

C. The NVRA's history and purpose reinforce the conclusion that States may send Section 20507(d)(2) notices based on nonvoting. Before the NVRA, most States removed registrants who had failed to vote for specified periods. Most of those States notified registrants and allowed them to avoid removal or re-register, but the notice procedures could be burdensome—and a few States failed to provide any notice at all. The NVRA eliminated the practice of removing nonvoters without notice and required States to use more protective notice procedures. But the legislative history indicates that Congress did not require States to abandon entirely the widespread practice of treating nonvoting as an indication that a registrant may have become ineligible.

Allowing States to send Section 20507(d)(2) notices based on nonvoting is also consistent with Congress's objective of ensuring accurate voter rolls while leaving the States substantial flexibility. Ohio and other States have determined that the most appropriate way to maintain accurate voting lists is to use nonvoting as an indication that a registrant may have moved, and to seek to verify the registrant's continued residence using

the procedure in Section 20507(d). Under the flexible structure Congress adopted in the NVRA and clarified in HAVA, that judgment is left to the States.

ARGUMENT

THE NVRA DOES NOT PROHIBIT STATES FROM USING REGISTRANTS' FAILURE TO VOTE AS GROUNDS FOR SENDING ADDRESS-VERIFICATION NOTICES UNDER 52 U.S.C. 20507(d)(2)

Ohio and several other States have long used a registrant's failure to vote for a specified period of years as grounds for sending an address-verification notice under 52 U.S.C. 20507(d)(2). That practice does not violate the NVRA. Nothing in Section 20507(d) itself limits the grounds on which States may send Section 20507(d)(2) notices. And although Section 20507(b)(2) prohibits the removal of a registrant "by reason of the person's failure to vote," it does not bar a State from using nonvoting as grounds for sending an address-verification notice. Registrants removed using that procedure are not removed "by reason of" their initial failure to vote. They are *sent a notice* because of that failure, but they are not *removed* unless they fail to respond and fail to vote for the additional period prescribed in Section 20507(d).

In the 15 years since HAVA's enactment, the Department of Justice has not taken enforcement action against Ohio or the other States that send Section 20507(d)(2) notices based on nonvoting. But the Department argued that the NVRA forbids that practice in a guidance document first issued in 2010 and in two recent amicus filings, including a brief filed in the court

of appeals in this case. Gov't C.A. Br. 2.[3] After this Court's grant of review and the change in Administrations, the Department reconsidered the question. It has now concluded that the NVRA does not prohibit a State from using nonvoting as the basis for sending a Section 20507(d)(2) notice. That conclusion is supported by the NVRA's text, context, and history. It is also faithful to the careful balance that Congress struck in the NVRA and clarified in HAVA.[4]

A. Section 20507(b)(2) Does Not Prohibit States From Sending Section 20507(d)(2) Notices Based On Registrants' Failure To Vote

Section 20507(d) authorizes States to remove a registrant's name from the rolls if the registrant fails to respond to an address-verification notice and then fails to vote during a period spanning two federal elections. Section 20507(d) itself does not restrict the grounds on which States may send address-verification notices, and thus does not preclude Ohio from sending those notices to registrants who have not voted for two years. The

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[3] The Department's post-HAVA enforcement actions reflect inconsistent positions on this issue. In 2007, the Department entered into a consent decree prohibiting a New Mexico county from sending Section 20507(d)(2) notices based on registrants' failure to vote. Amended Joint Stipulation ¶ 13, *United States* v. *Cibola Cnty.*, No. 93-cv-1134 (D.N.M. Jan. 31, 2007) (Gov't C.A. Br. Attach. 7). Later that year, however, the Department entered into a settlement with the Philadelphia Board of Elections that *required* the Board, consistent with Pennsylvania law, to send Section 20507(d)(2) notices to registrants who had not "voted nor appeared to vote" (or contacted the Board in a manner that resulted in a change in their voting records). Settlement Agreement ¶ 16(5), *United States* v. *City of Phila.*, No. 06-cv-4592 (E.D. Pa. Apr. 26, 2007) (Gov't C.A. Br. Attach. 11).

[4] The Department has updated its NVRA guidance to reflect the interpretation set forth in this brief. *DOJ Guidance* (Question 36).

court of appeals nonetheless held that Ohio's practice violates Section 20507(b)(2)'s prohibition on removing a registrant from the rolls "by reason of the person's failure to vote." That is not the best reading of Section 20507(b)(2) as originally enacted, and it is foreclosed by the clarifying clause that Congress added in HAVA.

1. Sending Section 20507(d)(2) notices based on nonvoting does not violate Section 20507(b)(2) because it does not result in the removal of registrants "by reason of" their failure to vote

a. As originally enacted, Section 20507(b)(2) provided that States' list-maintenance programs "shall not result in the removal of the name of any person * * * by reason of the person's failure to vote." NVRA § 8(b)(2), 107 Stat. 83. That provision barred States from treating failure to vote itself as a sufficient basis for removing a registrant from the rolls. It also made clear that State programs to remove ineligible registrants may not presume that registrants have become ineligible solely because they have failed to vote.

Section 20507(b)(2) did not, however, prohibit all list-maintenance procedures in which the failure to vote is *a* cause of a registrant's removal. To the contrary, the NVRA itself makes nonvoting a cause of change-of-residence removals under Section 20507(d), which provides that a State may remove a registrant's name from the rolls only if the registrant "has failed to respond to a [Section 20507(d)(2)] notice" and "has not voted or appeared to vote" during a period spanning the next two general federal elections. 52 U.S.C. 20507(d)(1). Section 20507(d) thus *requires* States to use nonvoting in their list-maintenance programs—in fact, it makes a failure to vote the final precondition for removal.

Section 20507(b)(2) cannot sensibly be construed to forbid the use of nonvoting that Section 20507(d) mandates. Instead, courts must interpret the statute "as a symmetrical and coherent regulatory scheme" and "fit, if possible, all parts into an harmonious whole." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (*Brown & Williamson*) (citations omitted). As the district court and Judge Siler explained, the most natural way to harmonize Section 20507(b)(2)'s prohibition with Section 20507(d)'s mandate is to conclude that registrants are removed "by reason of" their failure to vote in violation of Section 20507(b)(2) only if they are removed *solely* for nonvoting. Pet. App. 34a, 57a.

Congress confirmed that interpretation in HAVA. As explained below, see Part A.2, *infra*, HAVA amended Section 20507(b)(2) by adding a clarifying clause that resolves the question presented here. But HAVA also included a related provision that reinforces the natural interpretation of Section 20507(b)(2) as originally enacted. That provision requires States to create statewide voter lists and to maintain them in a manner "consistent with the [NVRA]." 52 U.S.C. 21083(a)(4). Congress then described Section 20507(b)(2)'s prohibition on removals for nonvoting as providing that "no registrant may be removed *solely* by reason of a failure to vote." *Ibid.* (emphasis added). The use of the word "solely" confirms that Section 20507(b)(2)'s prohibition on removals "by reason of" a registrant's failure to vote prohibits only removals based on nonvoting alone.

b. Ohio's Supplemental Process and similar state programs do not violate Section 20507(b)(2)'s prohibition because they do not remove registrants solely for nonvoting. Instead, registrants are removed only if they (i) initially fail to vote a specified period, (ii) fail to

respond to a notice seeking to verify their residence, and then (iii) fail to vote for an additional period spanning two federal elections. Registrants who are removed in part because they failed to respond to an address-verification notice are not removed solely for nonvoting.

The court of appeals appeared to agree that the phrase "by reason of the person's failure to vote" in Section 20507(b)(2) should be interpreted to mean "solely by reason of the person's failure to vote." Pet. App. 21a-22a. But the court nonetheless held that the Supplemental Process violates Section 20507(b)(2) because the "trigger [for sending Section 20507(d)(2) notices] is ultimately based 'solely' on a person's failure to vote." *Id.* at 22a. Respondents echo that view, emphasizing that the Supplemental Process "relies on failure to vote—and failure to vote alone—to subject the voter to the Address Confirmation Procedure." Br. in Opp. 31.

The court of appeals focused on the wrong question. Section 20507(b)(2) does not refer to "triggers," and it does not prohibit a State from *sending notices* "by reason of" a person's failure to vote. Instead, it prohibits "the *removal* of the name of any person * * * by reason of the person's failure to vote." 52 U.S.C. 20507(b)(2) (emphasis added); see 52 U.S.C. 21083(a)(4)(A) ("[N]o registrant may be *removed* solely by reason of a failure to vote.") (emphasis added). Respondents do not contend—and could not plausibly contend—that the Supplemental Process results in the *removal* of any registrant solely because of nonvoting.

c. Even if Section 20507(b)(2)'s prohibition were not limited to removals based solely on nonvoting, it still would not bar States from using nonvoting as grounds

for sending address-verification notices. If the recipient of such a notice fails to respond and then fails to vote for the additional period prescribed in Section 20507(d), the initial period of nonvoting is unquestionably a but-for cause of the ultimate removal. As this Court has recognized in a variety of contexts, however, "by reason of" and similar statutory phrases ordinarily require not merely but-for causation, but proximate causation as well. *Hemi Grp., LLC* v. *City of New York*, 559 U.S. 1, 9 (2010); see *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014) (collecting cases). The familiar proximate-cause requirement excludes but-for causes that are not legally cognizable because they are "too remote, purely contingent, or indirect." *Hemi Grp.*, 559 U.S. at 9 (brackets and citation omitted). "Every event has many causes, * * * and only some of them are proximate." *Paroline* v. *United States*, 134 S. Ct. 1710, 1719 (2014).

A registrant's initial failure to vote is not a proximate cause of a removal under the Supplemental Process. As the district court explained, "registrants are *queried* on the basis of their initial failure to vote, but not *removed* on that basis." Pet. App. 57a (citation omitted). Instead, they are removed only years later, if they fail to respond to the notice and fail to vote for an additional period spanning two general federal elections. That connection between the initial failure to vote and the ultimate removal is too remote to satisfy traditional proximate-causation standards—particularly because the causal chain includes the registrants' own failure to return postage prepaid cards seeking to verify their

residence. Cf. *Hemi Grp.*, 559 U.S. at 10 ("[T]he general tendency of the law, in regard to damages at least, is not to go beyond the first step.") (citation omitted).[5]

2. HAVA's clarifying amendment confirms that Section 20507(b)(2) does not prohibit States from sending Section 20507(d)(2) notices based on nonvoting

HAVA's clarifying amendment confirms that Section 20507(b)(2) does not prohibit States from sending Section 20507(d)(2) notices based on nonvoting. That clause was adopted against the backdrop of a recognized dispute over the question presented here. Congress resolved the dispute by directing that Section 20507(b)(2) may not be construed to prohibit a State from removing a registrant using the procedure described in Section 20507(d). Such a removal could in some circumstances violate other provisions of the NVRA, including the requirement that a State's list-maintenance activities be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." 52 U.S.C. 20507(b)(1). But HAVA makes clear that a State that follows the procedure described in Section 20507(d) does not violate Section 20507(b)(2)'s prohibition on removals for nonvoting.

a. The NVRA directed the FEC to "provide information to the States with respect to the responsibilities of the States under [the NVRA]." NVRA § 9(a)(4), 107

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[5] The registrants' failure to vote *after* receipt of the notice could fairly be deemed a proximate cause of their removal—indeed, it is the most immediate cause. But that use of nonvoting is specifically authorized by Section 20507(d), and respondents thus do not contend that it violates the NVRA. Instead, respondents' claim is that the Supplemental Process violates Section 20507(b)(2) because it results in the removal of registrants "by reason of" their initial, *pre-notice* failure to vote.

Stat. 87. Even before the NVRA took effect, the FEC advised the States that a dispute had arisen over the question presented here. The FEC observed that some States were considering "[s]ending the forwardable confirmation notice provided for in Section [20507](d)(2) based on the assumption that failure to vote over an extended period of time may indicate that the registrant no longer lives in the jurisdiction." FEC, *Implementing the NVRA: Requirements, Issues, Approaches, and Examples* 5-22 (Jan. 1, 1994) (D. Ct. Doc. 38-17 (May 24, 2016)). The FEC noted that this approach was "considered by some advocates to violate the [NVRA] because the ultimate effect of the action would be to remove people for failure to vote." *Id.* at 5-23. But the FEC itself did not express a view on that question.

In a 1998 update, the FEC reported that at least five States were using "failure to vote or failure to maintain contact [with election officials] as a trigger for sending [Section 20507(d)(2)] confirmation notices." *1998 FEC Report* 5-36. The FEC noted that the Department of Justice had argued in letters and enforcement actions that this practice violated the NVRA. *Ibid.* But the FEC advised that "the issue, which involves the interpretation of existing law, has not yet been resolved." *Ibid.*; see *id.* at 5-22 ("The issue * * * remains a question of the legal interpretation of NVRA provisions.").

b. Congress acted against this backdrop when it enacted HAVA in 2002. In a provision entitled "clarification of ability of election officials to remove registrants from official list of voters on grounds of change of residence," HAVA amended Section 20507(b)(2) by adding the following clause:

> [N]othing in this paragraph may be construed to prohibit a State from using the procedures described in

> subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual—
>
> (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then
>
> (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

HAVA § 903, 116 Stat. 1728 (capitalization altered); see 52 U.S.C. 20507(b)(2).

That clarification forecloses respondents' claim because it specifies that Section 20507(b)(2) may not be construed to prohibit what Ohio seeks to do. Under the Supplemental Process, Ohio "us[es] the procedures described in" Section 20507(d) "to remove an individual from the official list of eligible voters if the individual" has not responded to an address-verification notice and has not voted in a period spanning two general federal elections. 52 U.S.C. 20507(b)(2). There is no dispute that "the Supplemental Process fully incorporates [Section 20507(d)'s] procedure." Pet. App. 14a-15a. And because the Supplemental Process falls within the plain terms of the clarifying clause, "nothing in [Section 20507(b)(2)] may be construed to prohibit" the resulting removals. 52 U.S.C. 20507(b)(2).

c. The court of appeals adopted a different reading of HAVA's clarifying clause. In the court's view, the clause means only that Section 20507(b)(2) may not be construed to prohibit "the expressly permitted procedures outlined in subsections (c) or (d)." Pet. App. 20a; see Resp. Br. in Opp. 30. In other words, the court held

that the clarifying clause protects only the use of nonvoting that is specifically required as the final precondition for removal under Section 20507(d) (and by the safe-harbor program in Section 20507(c), which incorporates the Section 20507(d) procedure). That reading is unpersuasive for two reasons.

First, it is inconsistent with the text of the clarifying clause. Congress could have specified that "nothing in Section 20507(b)(2) may be construed to prohibit a State from using the failure to vote to the extent such use is required under subsections (c) and (d)." But Congress did not enact that language, or anything like it. Instead, Congress provided that Section 20507(b)(2) may not be construed "to prohibit a State from using the procedures described in subsections (c) and (d) to *remove* an individual from the official list of eligible voters." 52 U.S.C. 20507(b)(2) (emphasis added). That language covers any removal accomplished using the Section 20507(d) procedure—not just the specific use of nonvoting required in Section 20507(d).

Second, the court of appeals' interpretation would deprive the HAVA amendment of any practical effect. In the court's view, that amendment merely makes clear that Section 20507(b)(2) does not prohibit what Section 20507(d) specifically requires. But that was clear even without the amendment—both because a statute must be construed as "an harmonious whole," *Brown & Williamson*, 529 U.S. at 133 (citation omitted), and because any conflict between the specific requirements of Section 20507(d) and the general prohibition in Section 20507(b)(2) would have been resolved by the "commonplace of statutory construction that the specific governs the general," *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citation omitted).

Even before HAVA, therefore, there was no plausible argument that Section 20507(b)(2) prohibited what Section 20507(d) requires. There is also no indication that anyone advanced such an argument. This Court should not conclude that Congress amended Section 20507(b)(2) to foreclose an implausible interpretation that no one had advocated. "When Congress acts to amend a statute," the Court "presume[s] it intends its amendment to have real and substantive effect." *Husky Int'l Elecs., Inc.* v. *Ritz*, 136 S. Ct. 1581, 1586 (2016) (citation and internal quotation marks omitted). Consistent with the natural reading of its text, the HAVA amendment should thus be interpreted as clarifying that Section 20507(b)(2) may not be construed to prohibit a removal accomplished using the procedure in Section 20507(d). On that understanding, the amendment had "real and substantive effect," *ibid.*, because it settled a recognized dispute between the Department of Justice and the States on a question that the agency charged by Congress with disseminating information about the NVRA had recently identified as one that "ha[d] not yet been resolved." *1998 FEC Report* 5-36.[6]

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[6] Respondents err in asserting (Br. in Opp. 28-30) that this understanding contravenes Congress's direction that HAVA should not "be construed to authorize or require conduct prohibited under [the NVRA]." 52 U.S.C. 21145(a). The HAVA amendment did not alter the meaning of Section 20507(b)(2) as originally enacted; instead, it "clarif[ied]" that provision to resolve a recognized interpretive dispute. HAVA § 903, 116 Stat. 1728 (capitalization altered).

3. Interpreting Section 20507(b)(2) to allow States to send Section 20507(d)(2) notices based on nonvoting does not create surplusage

a. The court of appeals placed great weight on its belief that Section 20507(b)(2) would be "mere surplusage" unless it prohibited some removals that follow the Section 20507(d) procedure. Pet. App. 17a; see *id.* at 23a. The court reasoned that because Section 20507(d)(1) provides that States *must* follow the procedure described in Section 20507(d), Section 20507(b)(2) "would serve no purpose" if it were deemed inapplicable to removals that incorporate that procedure. *Id.* at 17a. That is not correct.

Section 20507(d)'s mandatory procedure applies only when a State removes a registrant's name from the rolls "on the ground that the registrant has changed residence." 52 U.S.C. 20507(d)(1). Section 20507(b)(2), in contrast, covers all aspects of a State's "program or activity" to maintain "an accurate and current voter registration roll." 52 U.S.C. 20507(b). Section 20507(b)(2) is thus neither "inoperative" nor "superfluous." *Clark* v. *Rameker*, 134 S. Ct. 2242, 2248 (2014) (citation omitted). It serves one of the key purposes of the NVRA's list-maintenance provisions because it bars States from removing individuals "merely because they have failed to cast a ballot in a recent election." Senate Report 17. Section 20507(b)(2) expressly directs, in other words, that a State may not treat nonvoting itself as a sufficient ground for removal.[7] It also prevents a State from presuming that a registrant who has failed to vote has died

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[7] Another provision of the NVRA arguably accomplishes the same result implicitly by specifying that the name of an individual who is validly registered "may not be removed from the official list of eligible voters except" on specified grounds, including "at the request

or otherwise become ineligible on a ground other than a change in residence. Cf. 52 U.S.C. 20507(a)(4)(A) (requiring States to remove the names of registrants who have become ineligible because of "the death of the registrant," but without specifying a mandatory procedure like the one in Section 20507(d)).

b. In the court of appeals, the Department of Justice advanced a different surplusage argument based on the HAVA provision that requires States to create statewide voter lists and adopt "[a] system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote." 52 U.S.C. 21083(a)(4)(A). That provision directs that:

> Under such system, consistent with the [NVRA], registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, *except that no registrant may be removed solely by reason of a failure to vote.*

Ibid. (emphasis added). The Department argued that the interpretation set forth in this brief would render the italicized language superfluous because it would mean that a registrant who is removed after failing to return a notice is *never* removed "solely by reason of a failure to vote." Gov't C.A. Br. 22-24. To avoid that asserted superfluity, the Department argued that a regis-

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of the registrant," "by reason of criminal conviction or mental incapacity," or by reason of death or a change in residence. 52 U.S.C. 20507(a)(3) and (4). But given the importance that Congress placed on barring removals based solely on the failure to vote, see Senate Report 17-18, it is not surprising that it made that prohibition explicit in Section 20507(b)(2), rather than leaving it implicit in the omission of failure to vote as a permissible basis for removal.

trant should be viewed as being removed "solely by reason of a failure to vote" if nonvoting is "the *trigger* for the Section [20507](d) notice." *Id.* at 23.

That argument is unpersuasive because it contradicts the plain language of Section 21083(a)(4). By definition, registrants who are removed because they "have not responded to a notice" *and* "have not voted in 2 consecutive general elections" are not removed "*solely* by reason of a failure to vote." 52 U.S.C. 21083(a)(4)(A) (emphasis added). This Court's "preference for avoiding surplusage constructions is not absolute," and it cannot prevail where, as here, the asserted superfluity could be avoided only by departing from the "plain meaning" of the statutory text. *Lamie* v. *United States Trustee*, 540 U.S. 526, 536 (2004); see *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).[8]

The better reading of Section 21083(a)(4)(A) is that it is an imprecise reference to the requirements set forth in more detail in Section 20507. On that view, the italicized language reiterates Section 20507(b)(2)'s general prohibition on removing a registrant solely for failing to vote—but it does not imply that registrants could somehow be removed "solely by reason of a failure to vote" if they are removed for failing to vote *and* failing to respond to a notice.

HAVA's legislative history confirms that reading. During committee consideration of the bill, a Member

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[8] In addition, "the canon against superfluity assists only where a competing interpretation gives effect 'to every clause and word of a statute.'" *Microsoft* v. *i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011) (citation omitted). The canon thus does not apply here because the court of appeals' interpretation would create a more glaring superfluity by denying any effect to the provision of HAVA amending Section 20507(b)(2). See pp. 22-23, *supra*.

observed that the italicized language appeared "unnecessary" because the preceding clause "makes very clear that you cannot remove someone unless they have not voted" *and* "have not responded to a notice." *Mark Up of H.R. 3295, the Help America Vote Act of 2001: Mark Up Before the Comm. on H. Admin.*, 107th Cong., 1st Sess. 12 (2001) (Rep. Doolittle). No one suggested a contrary interpretation. Instead, another Member confirmed the superfluity, explaining that "both" the italicized language and the preceding clause "mean that you can't remove somebody for not voting solely." *Ibid.* (Rep. Hoyer).

B. No Other Provision Of Section 20507 Prohibits States From Sending Section 20507(d)(2) Notices Based On Registrants' Failure To Vote

The court of appeals held that the Supplemental Process violates Section 20507(b)(2) because it results in the removal of registrants by reason of their failure to vote. Pet. App. 23a-24a. Respondents also argued, in the alternative, that the Supplemental Process violates an asserted requirement that a State may not send a Section 20507(d) notice unless it receives "reliable information" affirmatively indicating that a voter has moved. Resp. C.A. Br. 37; see Gov't C.A. Br. 17-20. The NVRA does not impose that requirement.

1. As the district court explained, neither Section 20507(d) nor any other provision of the NVRA addresses "who should be sent a confirmation notice or when that confirmation notice should be sent." Pet. App. 56a. Congress could have imposed a "reliable information" standard or some other specific prerequisite for sending Section 20507(d)(2) notices, but it did not. Instead, "that decision is left to the states." *Ibid.* In arguing that States may send Section 20507(d) notices

only based on "reliable information" affirmatively indicating a change in residence, respondents seek to "read requirements and language into the NVRA that simply are not there." *Ibid.*

2. Although nothing in Section 20507 explicitly requires a State to have "reliable information" affirmatively indicating a change in residence before sending a Section 20507(d)(2) notice, respondents and the Department of Justice have argued that such a requirement is implicit in Section 20507(a)(4) and Section 20507(c)(1). Neither provision supports that view.

Section 20507(a)(4) requires States to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters." 52 U.S.C. 20507(a)(4). Respondents and the Department of Justice have argued that sending Section 20507(d)(2) notices absent reliable information affirmatively suggesting a move violates that requirement because it "is not a *reasonable* way to identify persons who have changed residence." Gov't C.A. Br. 20 (emphasis added); see Resp. C.A. Br. 36-37.

As the context makes clear, however, Section 20507(a)(4) uses the qualifier "reasonable effort" to temper States' duty "to remove the names of ineligible voters." 52 U.S.C. 20507(a)(4). A State need not remove every ineligible registrant; it need only make a "reasonable effort" to do so. The word "reasonable" thus affords States some latitude in complying with the requirement in Section 20507(a)(4). It should not be read to authorize courts to impose additional *restrictions* on state removals beyond those that Congress adopted in the detailed and specific provisions of Section 20507. A court would, for example, have no principled basis for assessing respondents' contention that a registrant's

failure to vote for two years is not a "reasonable" basis for sending a Section 20507(d)(2) notice—or for determining whether four, ten, or 20 years of nonvoting would qualify as "reasonable."

Respondents have also emphasized that the safe-harbor program described in Section 20507(c)(1) uses Section 20507(d)(2) notices to "confirm" a change of residence suggested by information from the United States Postal Service. 52 U.S.C. 20507(c)(1)(B)(ii). Respondents have therefore asserted that any other use of a Section 20507(d)(2) notice must seek to confirm some comparably reliable indication that a registrant has moved. Resp. C.A. Br. 37; see Gov't C.A. Br. 17-19. But the Section 20507(c) program is optional. It makes clear that States "*may*" initiate the Section 20507(d) process based on information from the Postal Service, but it does not *preclude* them from utilizing different or additional triggers. 52 U.S.C. 20507(c)(1) (emphasis added). If Congress had intended to restrict the Section 20507(d) notice process to "confirming" some affirmative evidence of a change of residence, it would have said so expressly—not through oblique inferences from Section 20507(c)'s optional procedure.

3. Congress's failure to restrict the grounds on which States may send Section 20507(d)(2) notices was not inadvertent. An early version of the NVRA would have authorized States to send address-verification notices only if they first "determine[d] that a registrant may have changed his residence." S. 874, 101st Cong., 1st Sess. § 6(d) (as reported in the Senate Sept. 26, 1989); see S. Rep. No. 140, 101st Cong., 1st Sess. 20 (1989) ("The 'determination' referred to in subsection (d) * * * must be based on some reason to believe such voter is no longer at the registered address."). Another

predecessor bill would have authorized States to send a Section 20507(d)(2) notice only if the NCOA database indicated that a registrant had moved or an earlier notice was returned as undeliverable. H.R. Rep. No. 243, 101st Cong., 1st Sess. 3-4, 18-20 (1989). Congress rejected those proposals, and this Court should not interpret the NVRA to impose by implication requirements that Congress considered but declined to adopt.

C. The NVRA's History And Purpose Confirm That States May Send Section 20507(d)(2) Notices Based On Registrants' Failure To Vote

The history and purpose of the NVRA reinforce the conclusion that a State may send Section 20507(d)(2) notices based on registrants' failure to vote.

1. When Congress enacted the NVRA, most States had laws providing for the removal of registrants who had failed to vote for a specified period. Senate Report 46; House Report 30; see Steve Barber et al., *The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act*, 23 Harv. C.R.-C.L. L. Rev. 483, 550-551 (1988) (Barber) (collecting state laws). Those States either deemed nonvoting itself to be sufficient grounds for removal or treated it "as an indication that an individual might have moved." Senate Report 46; House Report 30. Most States notified the affected registrants of the removal, but five simply cancelled their registrations without notice. Barber 500, 550-551. Of the States that provided notice, some allowed registrants to remain on the rolls if they returned a postcard, while others imposed more burdensome requirements and still others required the affected individuals to register again. *Id.* at 506-507, 552-555.

The NVRA eliminated the practice of simply cancelling the registration of individuals who fail to vote.

52 U.S.C. 20507(b)(2). In addition, Section 20507(d) requires States to employ more protective notice procedures than those that prevailed before the NVRA. Registrants must be sent notices that include "postage prepaid and pre-addressed return card[s]" allowing them to remain registered, and even registrants who fail to return those cards must remain on the rolls for a period including the next two general federal elections. 52 U.S.C. 20507(d)(2).

The court of appeals interpreted the NVRA to require States not only to bring their notice procedures into conformity with Section 20507(d), but also to abandon entirely the practice of treating nonvoting as an indication that a registrant may have changed residences. At least two aspects of the NVRA's legislative history suggest that Congress did not mandate such a dramatic departure from pre-NVRA practices.

First, the report prepared by the Congressional Budget Office (CBO) on the costs of the NVRA—which was incorporated into the Senate and House Reports—described States' widespread reliance on nonvoting to initiate list-maintenance procedures but emphasized that "only a handful of states simply drop the non-voters from the list without notice." Senate Report 46; House Report 30. The CBO then observed that "*[t]hese states* could not continue this practice under [the NVRA]." *Ibid.* (emphasis added). That description is inconsistent with the more sweeping change required by the court of appeals' interpretation.

Second, the NVRA's supporters in Congress did not suggest that it would bar States from sending Section 20507(d)(2) notices based on registrants' failure to vote. To the contrary, although supporters emphasized that registrants should not be removed "*merely* because

they have failed to cast a ballot," Senate Report 17 (emphasis added), they noted that the NVRA would allow a removal if the registrant "has failed to respond to a notice * * * and has failed to vote or appear to vote in two Federal general elections," *id.* at 19; see House Report 16. Indeed, the Senate sponsor of the NVRA acknowledged that "nonvoting may be an indication that a registered voter has moved" and argued only that nonvoting "is not a *sufficient* reason for the removal of that person's name from the rolls." 137 Cong. Rec. 19,088 (1991) (Sen. Ford) (emphasis added); see *ibid.* (explaining that a predecessor bill with a provision materially identical to Section 20507(b)(2) "would prohibit the purging of a voter's name for the simple reason of failing to vote").

2. Allowing States to send Section 20507(d)(2) notices based on nonvoting is also consistent with the balance that Congress struck in the NVRA. Although Congress sought to "increase the number of eligible citizens who register to vote," it also sought "to protect the integrity of the electoral process" and "ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. 20501(b)(1), (3) and (4). The latter goals reflected Congress's recognition that "[t]he maintenance of accurate and up-to-date voter registration lists is the hallmark of a national system seeking to prevent voter fraud," Senate Report 18, and that "[i]naccurate registration lists are the bane of every election official" and "are extremely costly to the states, political parties, candidates and others who depend on them for effective voter contact," House Report 35-36 (citation omitted).

The safe-harbor process described in Section 20507(c) provides one cost-effective method for States to identify

registrants who have moved, but it has limitations. Among other things, it does not capture "the frequent occurrence of voters changing addresses without notifying the United States Postal Service." Pet. App. 42a; see *1998 FEC Report* 5-6. The safe-harbor process will thus inevitably "miss some registrants who no longer live at the address of record." *1998 FEC Report* 5-19.

States have responded to that problem by using a "variety of methods" in addition to or instead of the safe harbor process. Nat'l Ass'n of Sec'ys of State, *NASS Report: Maintenance of State Voter Registration Lists* 5-7 (Oct. 6, 2009). Some States, including Ohio, have made the judgment that the most appropriate way to maintain accurate voting lists is to use a registrant's failure to vote over a specified period as an indication that the registrant may have moved, and to seek to verify the registrant's residence using the procedure set forth in Section 20507(d). See Ga. Code Ann. § 21-2-234(a)(2) (Supp. 2017); Mont. Code Ann. § 13-2-220(1)(c)(iii) (2015); Okla. Stat. Ann. Tit. 26, § 4-120.2(A)(6) (West. Supp. 2017); 25 Pa. Cons. Stat. Ann. § 1901(b)(3) (West. 2007); W. Va. Code Ann. § 3-2-25(j) (LexisNexis 2013); see also Tenn. Code Ann. § 2-2-106(c) (2014) (superseded as of May 2, 2017). Under the flexible structure Congress adopted in the NVRA and clarified in HAVA, that judgment is left to the States. Cf. 52 U.S.C. 21085 ("The specific choices on the methods of complying with the requirements of" HAVA's list-maintenance provisions "shall be left to the discretion of the State.").

3. Finally, it bears emphasis that although the NVRA and HAVA do not prohibit States from sending Section 20507(d)(2) notices based on nonvoting, States' list-maintenance programs remain subject to a variety of safeguards. See, *e.g.*, 52 U.S.C. 20507(a)(1), (b)(1),

(c)(2), (d), and (e). Most notably, Congress specified that any list-maintenance program must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." 52 U.S.C. 20507(b)(1). That requirement applies to "any activity that is used to start, or has the effect of starting, a purge of the voter rolls," and it serves "to prohibit selective or discriminatory purge programs" and to ensure that any such program is applied "to an entire jurisdiction." Senate Report 31.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 52 U.S.C. 20507 (Supp. III 2015) provides:

Requirements with respect to administration of voter registration

(a) In general

In the administration of voter registration for elections for Federal office, each State shall—

(1) ensure that any eligible applicant is registered to vote in an election—

(A) in the case of registration with a motor vehicle application under section 20504 of this title, if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(B) in the case of registration by mail under section 20505 of this title, if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of 30 days, or the period provided by State law, before the date of the election; and

(D) in any other case, if the valid voter registration form of the applicant is received by the appropriate State election official not later than

the lesser of 30 days, or the period provided by State law, before the date of the election;

(2) require the appropriate State election official to send notice to each applicant of the disposition of the application;

(3) provide that the name of a registrant may not be removed from the official list of eligible voters except—

(A) at the request of the registrant;

(B) as provided by State law, by reason of criminal conviction or mental incapacity; or

(C) as provided under paragraph (4);

(4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of—

(A) the death of the registrant; or

(B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d);

(5) inform applicants under sections 20504, 20505, and 20506 of this title of—

(A) voter eligibility requirements; and

(B) penalties provided by law for submission of a false voter registration application; and

(6) ensure that the identity of the voter registration agency through which any particular voter is registered is not disclosed to the public.

(b) Confirmation of voter registration

Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office—

(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.) [now 52 U.S.C. 10301 et seq.]; and

(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual—

(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then

(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

(c) Voter removal programs

(1) A State may meet the requirement of subsection (a)(4) by establishing a program under which—

(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

(B) if it appears from information provided by the Postal Service that—

(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information; or

(ii) the registrant has moved to a different residence address not in the same registrar's jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) to confirm the change of address.

(2)(A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude—

(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a); or

(ii) correction of registration records pursuant to this chapter.

(d) Removal of names from voting rolls

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant—

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B)(i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B). If the card is not returned, affirmation or confirmation of the registrant's address may be required before the

registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters.

(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.

(3) A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection.

(e) Procedure for voting following failure to return card

(1) A registrant who has moved from an address in the area covered by a polling place to an address in the same area shall, notwithstanding failure to notify the registrar of the change of address prior to the date of an election, be permitted to vote at that polling place upon oral or written affirmation by the registrant of the change of address before an election official at that polling place.

(2)(A) A registrant who has moved from an address in the area covered by one polling place to an address in an area covered by a second polling place within the same registrar's jurisdiction and the same congressional district and who has failed to notify the registrar

of the change of address prior to the date of an election, at the option of the registrant—

(i) shall be permitted to correct the voting records and vote at the registrant's former polling place, upon oral or written affirmation by the registrant of the new address before an election official at that polling place; or

(ii)(I) shall be permitted to correct the voting records and vote at a central location within the same registrar's jurisdiction designated by the registrar where a list of eligible voters is maintained, upon written affirmation by the registrant of the new address on a standard form provided by the registrar at the central location; or

(II) shall be permitted to correct the voting records for purposes of voting in future elections at the appropriate polling place for the current address and, if permitted by State law, shall be permitted to vote in the present election, upon confirmation by the registrant of the new address by such means as are required by law.

(B) If State law permits the registrant to vote in the current election upon oral or written affirmation by the registrant of the new address at a polling place described in subparagraph (A)(i) or (A)(ii)(II), voting at the other locations described in subparagraph (A) need not be provided as options.

(3) If the registration records indicate that a registrant has moved from an address in the area covered by a polling place, the registrant shall, upon oral or written affirmation by the registrant before an election

official at that polling place that the registrant continues to reside at the address previously made known to the registrar, be permitted to vote at that polling place.

(f) Change of voting address within a jurisdiction

In the case of a change of address, for voting purposes, of a registrant to another address within the same registrar's jurisdiction, the registrar shall correct the voting registration list accordingly, and the registrant's name may not be removed from the official list of eligible voters by reason of such a change of address except as provided in subsection (d).

(g) Conviction in Federal court

(1) On the conviction of a person of a felony in a district court of the United States, the United States attorney shall give written notice of the conviction to the chief State election official designated under section 20509 of this title of the State of the person's residence.

(2) A notice given pursuant to paragraph (1) shall include—

(A) the name of the offender;

(B) the offender's age and residence address;

(C) the date of entry of the judgment;

(D) a description of the offenses of which the offender was convicted; and

(E) the sentence imposed by the court.

(3) On request of the chief State election official of a State or other State official with responsibility for determining the effect that a conviction may have on an

offender's qualification to vote, the United States attorney shall provide such additional information as the United States attorney may have concerning the offender and the offense of which the offender was convicted.

(4) If a conviction of which notice was given pursuant to paragraph (1) is overturned, the United States attorney shall give the official to whom the notice was given written notice of the vacation of the judgment.

(5) The chief State election official shall notify the voter registration officials of the local jurisdiction in which an offender resides of the information received under this subsection.

(h) Omitted

(i) Public disclosure of voter registration activities

(1) Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

(2) The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) are sent, and information concerning whether or not

each such person has responded to the notice as of the date that inspection of the records is made.

(j) "Registrar's jurisdiction" defined

For the purposes of this section, the term "registrar's jurisdiction" means—

(1) an incorporated city, town, borough, or other form of municipality;

(2) if voter registration is maintained by a county, parish, or other unit of government that governs a larger geographic area than a municipality, the geographic area governed by that unit of government; or

(3) if voter registration is maintained on a consolidated basis for more than one municipality or other unit of government by an office that performs all of the functions of a voting registrar, the geographic area of the consolidated municipalities or other geographic units.

2. 52 U.S.C. 21083(a) (Supp. III 2015) provides:

Computerized statewide voter registration list requirements and requirements for voters who register by mail

(a) Computerized statewide voter registration list requirements

(1) Implementation

(A) In general

Except as provided in subparagraph (B), each State, acting through the chief State election of-

ficial, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State (in this subsection referred to as the "computerized list"), and includes the following:

(i) The computerized list shall serve as the single system for storing and managing the official list of registered voters throughout the State.

(ii) The computerized list contains the name and registration information of every legally registered voter in the State.

(iii) Under the computerized list, a unique identifier is assigned to each legally registered voter in the State.

(iv) The computerized list shall be coordinated with other agency databases within the State.

(v) Any election official in the State, including any local election official, may obtain immediate electronic access to the information contained in the computerized list.

(vi) All voter registration information obtained by any local election official in the State shall be electronically entered into the com-

puterized list on an expedited basis at the time the information is provided to the local official.

(vii) The chief State election official shall provide such support as may be required so that local election officials are able to enter information as described in clause (vi).

(viii) The computerized list shall serve as the official voter registration list for the conduct of all elections for Federal office in the State.

(B) Exception

The requirement under subparagraph (A) shall not apply to a State in which, under a State law in effect continuously on and after October 29, 2002, there is no voter registration requirement for individuals in the State with respect to elections for Federal office.

(2) Computerized list maintenance

(A) In general

The appropriate State or local election official shall perform list maintenance with respect to the computerized list on a regular basis as follows:

(i) If an individual is to be removed from the computerized list, such individual shall be removed in accordance with the provisions of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.) [now 52 U.S.C. 20501 et seq.], including subsections (a)(4), (c)(2), (d),

and (e) of section 8 of such Act (42 U.S.C. 1973gg-6) [now 52 U.S.C. 20507].

(ii) For purposes of removing names of ineligible voters from the official list of eligible voters—

(I) under section 8(a)(3)(B) of such Act (42 U.S.C. 1973gg-6(a)(3)(B)) [now 52 U.S.C. 20507(a)(3)(B)], the State shall coordinate the computerized list with State agency records on felony status; and

(II) by reason of the death of the registrant under section 8(a)(4)(A) of such Act (42 U.S.C. 1973gg-6(a)(4)(A)) [now 52 U.S.C. 20507(a)(4)(A)], the State shall coordinate the computerized list with State agency records on death.

(iii) Notwithstanding the preceding provisions of this subparagraph, if a State is described in section 4(b) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-2(b)) [now 52 U.S.C. 20503(b)], that State shall remove the names of ineligible voters from the computerized list in accordance with State law.

(B) Conduct

The list maintenance performed under subparagraph (A) shall be conducted in a manner that ensures that—

(i) the name of each registered voter appears in the computerized list;

(ii) only voters who are not registered or who are not eligible to vote are removed from the computerized list; and

(iii) duplicate names are eliminated from the computerized list.

(3) Technological security of computerized list

The appropriate State or local official shall provide adequate technological security measures to prevent the unauthorized access to the computerized list established under this section.

(4) Minimum standard for accuracy of State voter registration records

The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:

(A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.) [now 52 U.S.C. 20501 et seq.], registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

(B) Safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.

(5) Verification of voter registration information

(A) Requiring provision of certain information by applicants

(i) In general

Except as provided in clause (ii), notwithstanding any other provision of law, an application for voter registration for an election for Federal office may not be accepted or processed by a State unless the application includes—

(I) in the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number; or

(II) in the case of any other applicant (other than an applicant to whom clause (ii) applies), the last 4 digits of the applicant's social security number.

(ii) Special rule for applicants without driver's license or social security number

If an applicant for voter registration for an election for Federal office has not been issued a current and valid driver's license or a social security number, the State shall assign the applicant a number which will serve to identify the applicant for voter registration purposes. To the extent that the State has a computer-

ized list in effect under this subsection and the list assigns unique identifying numbers to registrants, the number assigned under this clause shall be the unique identifying number assigned under the list.

(iii) Determination of validity of numbers provided

The State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law.

(B) Requirements for State officials

(i) Sharing information in databases

The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.

(ii) Agreements with Commissioner of Social Security

The official responsible for the State motor vehicle authority shall enter into an agreement with the Commissioner of Social Security under section 405(r)(8) of title 42 (as added by subparagraph (C)).

(C) Omitted

(D) Special rule for certain States

In the case of a State which is permitted to use social security numbers, and provides for the use of social security numbers, on applications for voter registration, in accordance with section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note), the provisions of this paragraph shall be optional.

3. 52 U.S.C. 21145(a) (Supp. III 2015) provides:

No effect on other laws

(a) In general

Except as specifically provided in section 21083(b) of this title with regard to the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.) [now 52 U.S.C. 20501 et seq.], nothing in this chapter may be construed to authorize or require conduct prohibited under any of the following laws, or to supersede, restrict, or limit the application of such laws:

(1) The Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.) [now 52 U.S.C. 10301 et seq.].

(2) The Voting Accessibility for the Elderly and Handicapped Act (42 U.S.C. 1973ee et seq.) [now 52 U.S.C. 20101 et seq.].

(3) The Uniformed and Overseas Citizens Absentee Voting Act (42 U.S.C. 1973ff et seq.) [now 52 U.S.C. 20301 et seq.].

(4) The National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.) [now 52 U.S.C. 20501 et seq.].

(5) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

(6) The Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.).

4. Section 8(b) of the National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 83, provides:

SEC. 8. REQUIREMENTS WITH RESPECT TO ADMINISTRATION OF VOTER REGISTRATION.

(b) CONFIRMATION OF VOTER REGISTRATION.—Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office—

(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.) [now 52 U.S.C. 10301 et seq.]; and

(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote.

5. Sections 903 and 906 of the Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1728, 1729-1730, provide:

SEC. 903. CLARIFICATION OF ABILITY OF ELECTION OFFICIALS TO REMOVE REGISTRANTS FROM OFFICIAL LIST OF VOTERS ON GROUNDS OF CHANGE OF RESIDENCE.

Section 8(b)(2) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-6(b)(2)) is amended by striking the period at the end and inserting the following: ", except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual—

"(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then

"(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.".

SEC. 906. NO EFFECT ON OTHER LAWS.

(a) IN GENERAL.—Except as specifically provided in section 303(b) of this Act with regard to the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), nothing in this Act may be construed to authorize or require conduct prohibited under any of the following laws, or to supersede, restrict, or limit the application of such laws:

(1) The Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.).

(2) The Voting Accessibility for the Elderly and Handicapped Act (42 U.S.C. 1973ee et seq.).

(3) The Uniformed and Overseas Citizens Absentee Voting Act (42 U.S.C. 1973ff et seq.).

(4) The National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.).

(5) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

(6) The Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.).

(b) NO EFFECT ON PRECLEARANCE OR OTHER REQUIREMENTS UNDER VOTING RIGHTS ACT.—The approval by the Administrator or the Commission of a payment or grant application under title I or title II, or any other action taken by the Commission or a State under such title, shall not be considered to have any effect on requirements for preclearance under section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c) or any other requirements of such Act.